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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR IVAN ZAVALA,

Defendant and Appellant.

F056331

(Super. Ct. No. BF117628A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Linda M. Leavitt, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and John G. McLean, Deputy Attorneys General, for Plaintiff and Respondent.

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Stephanie Gutierrez and Luis Ramirez were shot to death on the evening of January 13, 2007. Defendant Edgar Ivan Zavala was tried for the first degree murder of

the victims. In his first trial, the jury convicted defendant of the second degree murder of Stephanie Gutierrez. The jury found it was not true that he personally discharged a firearm resulting in great bodily injury or death. The jury was unable to reach a verdict on the second count of murder with Luis Ramirez as the victim, and a mistrial was declared.<sup>1</sup>

This appeal is from the retrial of the murder count listing Ramirez as the victim. The primary witness against defendant was his accomplice, Armando Ayala. Ayala testified that defendant was the shooter and Ayala thought defendant was only going to scare someone. The jury found defendant guilty of the first degree murder of Ramirez. The jury was unable to reach a verdict on the personal use of a firearm enhancement and a mistrial was declared as to the enhancement only. In addition, the special circumstance of multiple murders was found true. Defendant was sentenced to prison for a term of life without the possibility of parole.<sup>2</sup>

He appeals, claiming the evidence is insufficient to prove he was an aider and abettor of the murder of Ramirez. He also asserts the prosecutor committed misconduct in closing arguments to the jury. We affirm.

### **Facts**

Armando Ayala was the primary witness against defendant. Although originally charged with two counts of murder, he was allowed to plead to one count of assault with a firearm and one count of being an accessory after the fact. His agreed prison sentence was four years in exchange for his truthful testimony against defendant. He testified as an accomplice as a matter of law.

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<sup>1</sup> We have taken judicial notice of the file on appeal in defendant's first murder trial, F055345.

<sup>2</sup> The term of 15 years to life for the second degree murder conviction from *People v. Zavala*, F055345, was ordered to run concurrent to the life without the possibility of parole term for the murder in this case.

### *Accomplice Ayala's Testimony*

On January 13, 2007, Ayala and defendant had been friends for approximately three weeks. They were "hanging out" and drinking at the home of Raudel Medrano. Medrano had known defendant for several years and had known Ayala for only two or three weeks. Defendant and Ayala left Medrano's home that evening at approximately 10 p.m.

Ayala testified that after they left Medrano's house, Ayala and defendant came in contact with Stephanie Gutierrez and Vanessa Trejo in the alley behind the home of victim Ramirez. At first, the contact was cordial as defendant and Ayala helped the women move some clothes. The conversation then became heated. Trejo recognized Ayala as the grandson of Gumercinda Sixtos. Trejo's family members and Sixtos had been involved in a rent dispute. Trejo called Ayala a punk and made derogatory remarks towards Ayala's family. Defendant backed up Ayala and told Trejo to shut up.

As Ayala walked away to relieve himself, the argument between Trejo and defendant became more heated. Trejo told defendant he too was a punk and he was going to die. Defendant said Trejo was a bitch and told her to shut up. Defendant slapped Trejo and she swung at him with an empty bottle. Ayala grabbed defendant and they left.

Defendant asked Ayala if he still had a shotgun. Defendant had seen the shotgun at an earlier date. Ayala had found the shotgun in his grandmother's garage, where he was living. Ayala had fired the weapon on New Year's Eve. He testified that defendant was not there when he fired the gun on New Year's Eve, but arrived at about 1 a.m. Defendant and Ayala stopped first at "D's" house and acquired some shotgun shells. They then went to Ayala's house. Ayala went to the bathroom; when he emerged from the bathroom, defendant was seated on Ayala's bed with the shotgun.

Ayala and defendant returned to Ramirez's home, where Ayala, defendant, and Trejo had argued in the alley earlier. Ayala stood on the side of the house. Defendant

went to the front door carrying the gun. Defendant knocked on the door, and a male (Ramirez) answered the door. Defendant asked for Gutierrez, Ramirez responded that Gutierrez was right there. Ramirez then said “what the fuck” and tried to close the door. Ayala heard a shotgun blast. He heard two more blasts inside the house in quick succession, followed by the sound of a female moaning.

Ayala looked around the corner of the house and saw defendant coming out the door. Ayala and defendant ran, with defendant carrying the gun. Defendant fired one more shot in the alley.

Defendant and Ayala ran to Medrano’s house, where they encountered Trejo in the street with her boyfriend. Trejo started taunting them, and defendant pointed the gun at Trejo’s boyfriend. Trejo grabbed the gun and a struggle ensued. Ayala ran to the door of Medrano’s house and asked Medrano for help. Medrano came out and took the gun away from defendant and Trejo. He told everyone to leave.

Ayala and defendant then went to defendant’s house. Ayala spent the night at the house. When Ayala woke up the next morning, he went to his house. He was arrested later in the day.

When Ayala was initially questioned by law enforcement, he denied knowledge of the killings. After talking to his father, Ayala told officers what happened the evening of January 13, 2007.

#### *Testimony of Other Witnesses*

Other witnesses corroborated the account of the evening testified to by Ayala. Trejo testified that she was with Gutierrez on the evening of January 13, 2007. They encountered defendant and Ayala outside of Ramirez’s house. Trejo got into an argument with Ayala and defendant. Defendant called her a bitch. She slapped him and he slapped her back. An exchange of death threats occurred between defendant and Trejo. Trejo went inside of Ramirez’s house and called Alfredo Carmona to come and pick her up.

Carmona testified that he gave Trejo a ride to Ramirez's house on the evening of January 13, 2007. He got a telephone call to come back and pick her up. Carmona picked up Trejo, driving his vehicle with a loud exhaust system. After picking up Trejo, Carmona saw defendant and another male walking in the direction of Ramirez's house. While driving around with Trejo and her boyfriend, Carmona saw defendant again; this time he was running from the direction of Ramirez's house. Carmona dropped off Trejo and her boyfriend in an alley.

As Trejo and her boyfriend walked back towards Ramirez's house from the point where they were dropped off by Carmona, they encountered defendant and Ayala. Trejo confronted defendant near Medrano's house and said to him, "I thought you said you were going to kill me." At this point defendant took out a gun. Trejo grabbed the gun and a struggle ensued. Medrano came out of the house and took the gun.

Trejo left and walked towards Ramirez's house. She was stopped by law enforcement and questioned at the sheriff's substation.

Medrano testified regarding the presence of defendant and Ayala at his house earlier in the evening of January 13, 2007, and also later in the evening when Medrano took the gun away from defendant and Trejo. The gun was taken inside by Medrano. It accidentally went off on his bed.

A neighbor of Ramirez, John Reid, went outside on the evening of January 13, 2007, and saw a male and a female near Ramirez's residence. Reid went to the home of a neighbor who lived in the house in front of Ramirez. Reid told her that the side gate was open and asked her if she wanted him to close it. As Reid went to close the gate, he no longer saw the male and female near Ramirez's home. Reid heard a loud truck leaving the area. Approximately five to six minutes later, as Reid returned to his home, he heard a gunshot, then another gunshot. Reid ran to Ramirez's house and saw him in a pool of blood by the front door. A few days later he found a shell casing in the alley. The shell was turned in to law enforcement.

Ramirez died at the scene from a gunshot wound to his head. The pathologist who performed the autopsy testified that the wound to Ramirez would have caused blood spatter to go in every direction. Gutierrez died at the hospital from a gunshot wound to the abdomen.

The shirt identified as the one defendant was wearing the night of the murder was seized from his home. The shirt had two small spots on it that appeared to be blood. The shirt was sent for testing. The serologist who tested the spot from the shirt said the spot contained a major donor of DNA and two minor donors. The major donor was consistent with victim Ramirez. One of the minor donors was consistent with defendant.

A shotgun was seized from the roof of Medrano's home. It was determined that the shotgun shells seized from the homicide scene and the shell found by Reid in the alley were fired from the gun retrieved from the roof of Medrano's home.

#### *The "Kite"*

On June 1, 2008 (after completion of the first trial) a deputy sheriff in the jail found a "kite" (a note passing information among inmates) in defendant's single cell. The kite was from defendant to "Bleu." It asked Bleu to read the message to Ayala, asking Ayala to change his story when they go back to trial. Defendant asked Ayala to help him out and do this final favor for him. In addition, the note said, "Don't tell them it was you," but asked Ayala to "switch all kinds of shit up and tell them that what you said was what the D.A. told you to say."

#### *Defense*

Gumercinda Sixtos, Ayala's grandmother, testified that Ayala had been living with her since December of 2006. Her deceased husband had a shotgun that Sixtos kept in the garage. She never saw Ayala with the gun. In addition, every day she cleaned out the closet where Ayala said he kept the gun. She never saw the gun in the closet during her daily cleaning, and the closet did not contain many items. Sixtos did not hear any gunshots on New Year's Eve when Ayala was in her driveway with friends.

Fifteen-year-old G.E. testified that defendant was at her house on New Year's Eve. He arrived at approximately 9 p.m. and left at 1 or 2 a.m.

## **Discussion**

### *I. Substantial Evidence*

Defendant contends the evidence is insufficient to support his first degree murder conviction based on a theory of aiding and abetting. He argues the inability of the jury to reach a verdict on the personal use of a firearm enhancement indicates the jury did not find defendant to be the shooter, which was the basis of Ayala's testimony. Absent Ayala's testimony, defendant claims the remaining evidence is only sufficient to show that defendant may have been an accessory after the fact, but was not sufficient to show he was an aider and abettor.

In making a determination of whether substantial evidence supports a conviction “we do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact. [Citation.] We simply consider whether “‘any rational trier of fact could have found the essential elements of [the charged offenses] beyond a reasonable doubt.’” [Citations.]’ [Citation.] Unless it is clearly shown that ‘on no hypothesis whatever is there sufficient substantial evidence to support the verdict’ the conviction will not be reversed. [Citation.]” (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162, brackets in original.)

“An aider and abettor is one who acts with both knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating commission of the offense.” (*People v. Avila* (2006) 38 Cal.4th 491, 564.) “[M]ere ‘presence at the scene of a crime or failure to prevent its commission [is not] sufficient to establish aiding and abetting.’” (*People v. Richardson* (2008) 43 Cal.4th 959, 1024, brackets in original.)

Defendant relies on *People v. Rutkowsky* (1975) 53 Cal.App.3d 1069 to support his position. In *Rutkowsky*, the defendant's murder conviction was clearly supported by

substantial evidence and he did not raise a substantial evidence argument on appeal. Rutkowsky and the victim engaged in an argument and physical confrontation. They separated, and several hours later they confronted each other again. The defendant shot the victim in the face with a shotgun. On appeal, the defendant did challenge whether the court should have instructed the jury to view the testimony of alleged accomplices, Rose and Rodriguez, with distrust. The appellate court found that the trial court did not err in failing to give the accomplice testimony instruction because the evidence did not show that either Rose or Rodriguez was an accomplice. Rodriguez was merely a percipient witness. Rose knew of the first argument and knew of “the victim’s return to the home and had asked defendant also to return there.” Rose also knew there was a shotgun in the house. The appellate court found that assistance after the fact was insufficient to show aiding and abetting. (*Id.* at pp. 1071-1073.)

Defendant argues that, as in *Rutkowsky*, the evidence here was only sufficient to show that he may have been an accessory after the fact because he ran away with Ayala and had possession of the weapon. To the contrary, as we will discuss, the evidence here is sufficient to show aider and abetter liability.

We are not required to reject all of Ayala’s testimony in determining the sufficiency of the evidence. “The jury is the ultimate judge of credibility. The jury may find a witness is credible in some respects and not in others; it may believe parts of a witness’s testimony without believing all of it.” (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1029; see *People v. Anderson* (2007) 152 Cal.App.4th 919, 940.)

The evidence here was more than sufficient to support defendant’s conviction. He had an argument earlier in the evening outside the home of Ramirez. Trejo was calling defendant and Ayala names. Defendant threatened to kill Trejo. Trejo retreated into the home of Ramirez. Defendant asked Ayala if he still had the gun, and they obtained shells before returning to Ayala’s home where defendant obtained the shotgun. Defendant and Ayala were seen returning to the place where the original confrontation took place. At



this location, Ramirez and Gutierrez were shot and killed. Defendant was seen running from the scene of the crime and was in possession of the murder weapon after the crime. Defendant had the blood of Ramirez on his shirt. Evidence of his consciousness of guilt and active involvement in the killings was shown by the note he wrote asking Ayala to change his testimony and stating that things “went down the wrong way.”

The jury could have believed Ayala had much more involvement than he testified to and, based on this partial disbelief of Ayala’s testimony regarding his involvement, it may have not been able to determine who the shooter was beyond a reasonable doubt; this is a likely explanation as to why it was unable to reach a unanimous verdict on the firearm enhancement. Yet, the jury still could have found that Ayala and defendant acted together in returning to the scene of the confrontation to shoot the individuals in the home where the confrontation took place. The evidence supported this theory. Substantial evidence supports defendant’s conviction of the first degree murder of Ramirez.

## *II. Allegation of Prosecutorial Misconduct*

In the initial argument to the jury, the People argued that based on the evidence defendant was the shooter; however, if the jury disagrees that defendant was the shooter, then defendant is guilty as an aider and abettor. The prosecutor told the jury to give whatever weight it thought the testimony of Ayala deserved.

The focus of defense counsel’s argument was that Ayala was a liar and was the shooter. It was argued that there was no evidence defendant aided Ayala in the shooting. In addition, defense counsel argued that the portion of the kite from defendant telling Ayala he did not have to say he (Ayala) was the shooter, is clear evidence Ayala was the shooter and defendant was telling Ayala that he need not confess to the killings, just mix things up. Defense counsel’s final remark to the jury was: “Mr. Pafford [prosecutor] is now going to address you. And remember listen to what he says carefully. But he is not going to be able to show you any evidence of aiding and abetting, and his witness is a

liar. I have shown him to be a liar. And you should not find my guy guilty on the testimony of a liar when he has no reason to lie unless he was the shooter.”

The prosecutor began his closing rebuttal argument by stating, “First of all, I need you to know I was the one that made the deal with Armando Ayala that came to him being able to testify. So if you need to be mad at somebody about that, it was me. It’s not the case. It’s not Mr. Ramirez or Stephanie Gutierrez. It was me that made that choice.” No objection was made to this statement.

The next focus of the prosecutor was in refuting the significance of any lies Ayala might have told. The prosecutor then spoke to the jury about aiding and abetting. The kite was the next subject of argument; the prosecutor argued that reading it in context does not prove defendant was not the shooter.

The prosecutor then said, “And, again, I made the deal with Armando Ayala. If Armando Ayala comes in and says, you know what, ladies and gentlemen, I did it, I was the shooter, I killed him, defendant didn’t have anything to do with it, there is nothing in this world that I can do to Armando Ayala anymore.”

Defense counsel objected, stating there was no evidence to support this comment. A sidebar was held and the objection was overruled. The prosecutor continued, “So, ladies and gentlemen, there is no evidence presented to you that Armando Ayala would think, you know, he would be charged with murder. The only evidence -- and the law is the law. And the law says there’s nothing I can do. I would be stuck. So there’s no reason to say what -- no reason to read the kite as Mr. Coker [defense counsel] wishes you to read it. The only logical way is to say the defendant knows he is guilty and that’s why he wrote it.”

Defendant claims the two comments by the prosecutor that he made the deal with Ayala amounted to vouching for the credibility of the witness and was prosecutorial misconduct. Defendant argues that the prosecutor’s comments were the same as the prosecutor giving his personal opinion that Ayala’s story was the truth and was credible.

Defendant admits there was no objection to the first comment, but argues that any objection would have been futile. If the issue is deemed waived for lack of an objection, then defendant claims his counsel was ineffective in failing to make the objection.

“A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of her office behind a witness by offering the impression that she has taken steps to assure a witness’s truthfulness at trial.” (*People v. Frye* (1998) 18 Cal.4th 894, 971.)

“A defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.” (*People v. Thornton* (2007) 41 Cal.4th 391, 454.) “[T]he failure to request that the jury be admonished does not forfeit the issue for appeal if an admonition would not have cured the harm caused by the misconduct.” (*People v. Cole* (2004) 33 Cal.4th 1158, 1201.)

Defense counsel did not object to the first comment, and although he objected to the second comment he did not object on the ground now asserted on appeal. He also did not request an admonition to the jury. Defendant waived this issue for appeal. Waiver is not avoided by defendant’s conclusory assertion that any objection and request for an admonition would have been futile. Furthermore, the comments by the prosecutor are subject to more than one interpretation. The interpretation that the comments amounted to vouching for the credibility of Ayala is one not clear on the face of the comments, and it is unlikely the jury interpreted the comments as vouching for credibility.

A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel’s inaction violated the defendant’s constitutional right to the effective assistance of counsel. The appellate record, however, rarely shows that the failure to object was the result of counsel’s incompetence; generally, such claims are more appropriately litigated on habeas corpus, which allows

for an evidentiary hearing where the reasons for defense counsel's actions or omissions can be explored. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Defense counsel may have had a tactical reason for not objecting and/or requesting an admonition. While the comments by the prosecutor may be interpreted as obliquely vouching for the credibility of a witness, an admonition would have directly highlighted the possible vouching and counsel would not have wanted to draw attention to or directly point out this possible interpretation. Defendant has failed to establish a claim of ineffective assistance of counsel because he has not shown that counsel's performance fell below an objective standard of reasonableness. (*People v. Lopez* (2008) 42 Cal.4th 960, 966.)

### **Disposition**

The judgment is affirmed.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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KANE, J.

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POOCHIGIAN, J.